RHB BANK BHD

v.

DONG HAENG INDUSTRIES SDN BHD

HIGH COURT MALAYA, JOHOR BAHRU
ABDUL MALIK ISHAK J
[CIVIL SUIT NO: 22-497-1998]
27 JANUARY 2000

CIVIL PROCEDURE: *Pleadings - Striking out writ and statement of claim - Rules of the High Court 1980, O. 18 r. 19(1)(a) - Whether plaintiff has a reasonable cause of action - Sufficiency of pleadings - Whether action should go to trial*

This was the defendant's appeal to the judge in chambers against the decision of the Deputy Registrar dismissing its application to strike out the plaintiff's writ of summons and statement of claim under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ('RHC'). The plaintiff's claim was for moneys due and owing under a letter of credit. The defendant, in support of its appeal, contended that the plaintiff had failed to plead all the necessary ingredients to establish a cause of action.

The issues to be considered were whether the plaintiff had a reasonable cause of action against the defendant, and whether there was a condition precedent that had to be fulfilled by the plaintiff before repayment by the defendant shall commence.

Held:

[1] The plaintiff had shown that its statement of claim contained every relevant fact to support its claim. Therefore, the facts that amounted to a reasonable cause of action had been alleged by the plaintiffs and its claim had been properly made out.

[2] Since the defendant had contended the non-performance of a condition precedent, the specifics of the said condition should have been stated; otherwise its due performance would be presumed. On the facts, the defendant had failed to show this and therefore compliance by the plaintiff could readily be implied.

[3] On the issue of pleading material facts, it was clear that the plaintiff's complaint against the defendant was for breach of contract, and did not include the issues of presentation of stipulated documents, and non-compliance of conditions precedent. Therefore, the plaintiff should be given the opportunity of a full trial.

[Defendant's appeal dismissed.]

Case(s) referred to:

Bank Bumiputra Malaysia Bhd v. Mahmud Hj Mohamed Din (Datin Hjh Salma Md Jamin, Intervener) [1989] 1 MLJ 381 ***(refd)***

Beaufort International Hotels Ltd v. Tanjong Aru Hotel Sdn Bhd [1988] 2 CLJ 638 ***(refd)***

Beyene & Hanson v. Irving Trust Co 762 Fed Rep 2nd series 4 ***(refd)***

English, Scottish & Australian Bank Ltd v. Bank of South Africa [1922] Lloyd's Rep 21 ***(refd)***

Equitable Trust Company of New York v. Dawson Partners Ltd [1927] Lloyd's List Law Reports, vol 2, 49 ***(refd)***

Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd [1981] 1 MLJ 105 ***(refd)***

Fox v. Jolly [1916] 1 AC 1 ***(refd)***

Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors [1998] 1 SLR 374 ***(refd)***

Gant v. South Western & Country Properties [1975] Ch 185 ***(refd)***

Gates v. WA & RJ Jacobs Ltd [1920] 1 Ch 567 ***(refd)***

Hall v. Eve [1876] 4 Ch D 341 ***(refd)***

Hirsch & Anor v. Somervell & Ors [1946] 2 All ER 430 ***(refd)***

JH Rayner & Co Ltd v. Hambro's Bank Ltd [1943] 1 KB 37 ***(refd)***

Lim Seak Huat v. Malayan United Realty Sdn Bhd [1997] 5 CLJ 336 ***(refd)***

Lord Hammer v. Flight [1876] 24 WR 347 ***(refd)***

May v. Chidley & Anor [1894] 1 QB 451 ***(refd)***

Midland Bank, Ltd v. Seymour [1955] 2 Lloyd's List Law Reports 147 ***(refd)***

Moralice (London) Ltd v. ED & F Man [1954] 2 Lloyd's Rep 526 ***(refd)***

Nasri v. Mesah [1971] 1 MLJ 32

New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor [1985] 1 MLJ 226 ***(refd)***

Ng Kian Chong & Ors v. Saw Seng Kee [1994] 4 CLJ 857 ***(refd)***

NW Salt Co Ltd v. Electrolytic Alkali Co Ltd [1913] 3 KB 425 ***(refd)***

Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors [1999] 2 CLJ 886 ***(refd)***

Philipps v. Philipps [1878] 4 QBD 133 ***(refd)***

Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor [1995] 4 MLJ 691 ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 3

Rules of the High Court 1980, O. 18 rr. 7(1), (4), 8(1), 19(1)(a), O. 24 r. 1

Bills of Exchange Act 1949 [UK], s. 48

Conveyancing Act 1881 [UK], s. 14

Other source(s) referred to;

Law of Banking, Poh Chu Chai, 2nd edn, pp 31, 958

Law of Banking, Volume 2: Pledges, Guarantees And Letters Of Credit, Poh Chu Chai, 3rd edn, pp 468-469

The Supreme Court Practice, 1982, vol 1, Part 1, pp 302-303

For the plaintiff - Goh Mey Foon; M/s Leng & Co
For the defendant - John Yeo Chun Ming; M/s CM Yeo & Assoc

Reported by Suresh Nathan

JUDGMENT

Abdul Malik Ishak J:

Introduction

The defendant filed an application in encl. 11 to strike out the plaintiff's writ of summons together with the statement of claim under O. 18 r. 19(1)(a) of the Rules of the High Court 1980 ("RHC") on the ground that it disclosed no reasonable cause of action.

The learned deputy registrar in the person of Che Mohamed Zulkifly bin Jusoh heard encl. 11 and he dismissed it with costs. The defendant being aggrieved now appeals to the judge in chambers as per encl. 32.

Brief Facts

The plaintiff's claim against the defendant is simply for the recovery of the amount paid by the plaintiff under the letter of credit bearing number 10053400312 issued by the plaintiff at the request of the defendant (hereinafter referred to as the "letter of credit") together with interest and costs.

After the defendant had:

(1) entered an unconditional appearance as reflected in encl. 4 on 7 October 1998; and had

(2) filed the statement of defence and counterclaim on 22 October 1998 as reflected in encl. 6,

and after the defendant too had been served with the unsealed copy of the plaintiff's application for summary judgment as reflected in encl. 9, then the defendant sluggishly and at a leisurely pace proceeded to file encl. 11 for the purpose of striking out the plaintiff's writ of summons together with the statement of claim under O. 18 r. 19(1)(a) of the RHC on the ground that it disclosed no reasonable cause of action. That brilliant judge by the name of Mohamed Azmi FJ in *New Straits Times (Malaysia) Bhd v. Kumpulan Kertas Niaga Sdn Bhd & Anor* [1985] 1 MLJ 226 at p. 228 aptly said:

> It is therefore clear law that in an application to strike out pleadings under O. 18 r. 19(1)(a), no evidence shall be admissible, and the court must consider only the pleadings for the purpose of determining whether the Statement of Claim disclosed no reasonable cause of action or the Statement of Defence disclosed no defence. The test to be applied is whether on the face of the pleading, the court is prepared to say that the cause of action or the defence is obviously unsustainable (see *A.G. of the Duchy of Lancaster v. L and N.W. Ry Co.* [1892] 3 Ch. 274).

and that would be the law to be applied in deciding the fate of encl. 32. Am I prepared to hold that the cause of action in the present case was obviously unsustainable? Certainly not.

Reasonable Cause Of Action

The defendant contended that the plaintiff had failed to plead all the necessary ingredients in order to establish a cause of action against the defendant. The defendant proceeded to itemise what the plaintiff should have pleaded in its statement of claim and the following items were emphasised and highlighted and they were conveniently referred to as the "omitted facts":

(a) the salient terms of the letter of credit encompassing the confirmation in regard to the validity or expiry of the letter of credit;

(b) to identify the documents that must be tendered to the plaintiff before the obligation on the plaintiff – as the issuing bank, to pay would arise;

(c) to identify the documents that have been tendered and whether those documents so tendered complied strictly with the terms of the letter of credit;

(d) to set out the time and the date of the presentation or the tendering of all the relevant documents; and

(e) to confirm whether the payment was made in accordance with the terms of the letter of credit.

Bluntly put, the defendant's contention was quite simple: the plaintiff must plead all the necessary ingredients in order to establish a claim under the cause of action for which the plaintiff had instituted. Abu Mansor J (now FCJ) in *Beaufort International Hotels Ltd v. Tanjong Aru Hotel Sdn Bhd* [1988] 2 CLJ 638, 642 spoke of the need to spell out the cause of action in these words:

> 18. It is settled and trite law that the court can only decide on matter that are pleaded before it. It is basic that it is for the plaintiffs to spell out their cause of action so that the defendants will have notice of what is being alleged against them to have the issues to be defined and thus to enable them to defend. It is also settled law that the plaintiffs are to make suitable amendment, if necessary. It is not for the court to formulate the plaintiff's claim or infer from the pleadings. To my mind, the relief of the action, such as declaration and specific performance, must be pleaded by the plaintiffs and it is also settled law that their omission can in no way be made good or supplied by affidavit evidence. (see *S.F. International v. Transcon* [1985] 2 MLJ 62, 66). In *Gold Ores Reduction* [1892] 2 QBD 14 and *National Company for Foreign Trade v. Kayu Raya* [1984] 2 CLJ 220, the court held that the statement of claim must be complete.

On the importance of pleadings, Peh Swee Chin J (as he then was) in *Bank Bumiputra Malaysia Bhd v. Mahmud bin Haji Mohamed Din (Datin Hajjah Salma bte Md Jamin, Intervener)* [1989] 1 MLJ 381, 382 had this to say:

> Before I comment on the submission stated above, I shall like to make it clear that though the facts of any given case may sometimes give rise to all sorts of speculative issues, however, at the end of the day, it is only the issues, whether on questions of law or fact, which are specifically and actually raised or pleaded that invite the adjudication by the court which cannot go outside the pleadings or statements in the nature of the pleadings.

On the other end of the scale, one must not forget the case of *Lim Seak Huat v. Malayan United Realty Sdn Bhd* [1997] 5 CLJ 336, 350 where the court there observed:

> Mr. Ibrahim Hashim, the learned counsel for the plaintiff, argued that the power to summarily strike out a pleading must be sparingly exercised. He relied on the passage appearing in the judgment of Mohamed Dzaiddin bin Hj. Abdullah SCJ (now FCJ) in the case of *Bandar Builder Sdn Bhd & 2 Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 particularly at p. 11 where his Lordship said:
>
> > This court as well as the court below are not concerned at this stage with the respective merits of the claims. But what we have to consider is whether the counterclaim discloses some cause of action and, likewise, whether the defence to counterclaim raises a reasonable defence. It has been said that so long as the pleadings disclose some cause of action or raise some question fit to be decided, by the judge, the mere fact that the case is weak and not likely to succeed at the trial is no ground for the pleadings to be struck out (*Moore v. Lawson* [1915] 31 TLR 418 CA; *Wenlock v. Moloney (supra)*).

Diplock LJ defined cause of action in *Letang Cooper* [1965] 1 QB 232 CA as:

> … simply a factual situation of existence of which entitles one person to obtain from the court a remedy against another person.

Lord Esher in *Read v. Brown* [1988] 22 QBD 128 defined the phrase to mean every fact, though not every piece of evidence, which was necessary for the plaintiff to prove, if traversed, to support the plaintiff's right to the judgment of the court.

Now, the question to pose would be this: Was there some cause of action shown by the plaintiff, however weak, or some question fit to be decided by this court? For this exercise, I need to examine the surrounding circumstances and the factual background of the case (*Keng Huat Film Co. Sdn Bhd v. Makhanlall (Properties) Pte Ltd (supra)*).

Proceeding further, I must also refer to the case of *Nasri v. Mesah* [1971] 1 MLJ 32 FC where the late Gill FJ remarked at p. 34 of the report:

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v. Brown* [1889] 22 QBD 128, 131). In *Reeves v. Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
>
> > This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v. Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events: but it has always been held that the statute runs from the earliest time at which an action could be brought.
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> In *Board of Trade v. Cayzer, Irvine & Co*. [1927] AC 610, 617 Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach.

To summarise, a cause of action may be described as the entire set of facts that gives rise to an enforceable claim. Perusing through the statement of claim, it may be surmised that every fact which was necessary to support the plaintiff's claim had been alluded to. Going into details, I must now refer to the relevant paragraphs in the statement of claim. Paragraph 3 of the statement of claim contained the following averments:

> By a documentary credit application dated 6.11.1997 ('the documentary credit application'), the defendant applied for the issue of and the plaintiff had on 18.11.1997 issued a letter of credit bearing number 10053400312 in favour of Tae Heung Leather Inc ('the first beneficiary') for the sum of USD150,000.00 upon the terms and conditions contained in:

(a) the documentary credit application;

(b) a general letter of indemnity dated 5.11.1997 ('the general letter of indemnity'); and

(c) the Uniform Customs and Practice for Documentary Credit, 1993 Revision International Chamber of Commerce No: 500 ('UCP 500').

Paragraph 4 of the statement of claim was worded in this way:

> The letter of credit is an irrevocable letter of credit and under the terms thereof, the plaintiff agreed to pay the first beneficiary a sum of USD150,000.00 (for the defendant's purchase of 'smoke removal system for automobile' from the first beneficiary) upon signing the documents listed in the letter of credit ('payment on sight').

Paragraph 5 of the statement of claim averred as follows:

> Partial shipment is allowed under the letter of credit.

Paragraph 6 of the statement of claim was worded and phrased in this way:

> Under:
>
> (a) the documentary credit application, the defendant had empowered the plaintiff to pay and to charge any of the defendant's accounts for all moneys paid and for which the plaintiff had been made liable under the letter of credit;
>
> (b) the general letter of indemnity, the defendant agreed and undertook to indemnify the plaintiff against:
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> (i) all liabilities, losses, damages, costs, etc, which the plaintiff incurred or sustained by reason of granting the defendant the said credit (that is by issuing the letter of credit) or arising in relation to the granting of the credit; and
>
> (ii) all legal and other costs that the plaintiff incurred in connection with the enforcement of the plaintiff's rights under the general letter of indemnity; and
>
> (c) UCP 500, the plaintiff only deals with documents and not goods.

Paragraph 7 of the statement of claim was coined in this fashion:

> Upon the request of the defendant, the letter of credit was amended and made transferable from the first beneficiary to Sunkyung Limited ('the second beneficiary') subject to the transferring bank giving the plaintiff an advice letter on the address of the transferee and the amount, quantity and date of transfer.

Paragraph 8 of the statement of claim was quite brief and it was worded as follows:

> The first delivery for the sum of USD75,000.00 was paid by the plaintiff on 11.12.1997.

Paragraph 9 of the statement of claim was phrased in this way:

> The plaintiff had on 23.2.1998 paid the second beneficiary the balance sum of USD75,000.00 under the letter of credit together with late payment interest of USD1,156.25.

Paragraph 10 of the statement of claim averred as follows:

> The total amount paid on 23.2.1998 was immediately converted to Ringgit, at the exchange rate of USD 1 : RM3.8710, and by virtue of the said conversion, the total amount paid by the plaintiff under the letter of credit was RM294,800.84.

Paragraph 11 of the statement of claim contained this averment:

> Under the documentary credit application and in accordance with customs and practice of bankers, the plaintiff is entitled to charge and the defendant is liable to pay interest on the amount of RM294,800.84 calculated on daily basis at the rate of 5% above the plaintiff's base lending rate (or such other rate as determined by the plaintiff from time to time) commencing on 23.2.1998.

Paragraph 12 of the statement of claim was worded thus:

> The plaintiff had vide its solicitors' notice dated 1.4.1998 demanded from the defendant the said sum of RM294,800.84 together with interest and costs. However, the defendant had failed, refused and/or neglected to pay the amount demanded or any part thereof.

Paragraph 13 of the statement of claim was worded in this way:

> The plaintiff had on 26.6.1998 set off from the account of the defendant a sum of RM28,000.00 towards part payment of the principal sum and interest owing under the letter of credit.

Finally, para. 14 of the statement of claim was worded thus:

> After taking into consideration the amount set off, the defendant still owed the plaintiff the principal sum or RM283,792.67 calculated as at 26.6.1998 together with interest thereon calculated on daily basis at the rate of 5% above the plaintiff's base lending rate commencing on 26.6.1998 to date of full payment.

I have taken an arduous course by reproducing in verbatim complete with its translations the relevant paragraphs in the statement of claim to reflect the plaintiff's cause of action against the defendant. All these paragraphs in the statement of claim clearly showed beyond per adventure that every material fact which is required to support the plaintiff's claim against the defendant had been spelt out clearly and lucidly in the statement of claim. It was clearly averred in the statement of claim that:

(1) the basis of the plaintiff's claim was in the nature of a contractual claim that was based on the terms of the documentary credit application, the general letter of indemnity and the UCP 500;

(2) the actual granting of the credit was by way of the issuance of the letter of credit;

(3) the actual payment by the plaintiff came under the purview of the letter of credit, that is, by way of payment to the second beneficiary; and

(4) the breach by the defendant by their failure to pay and indemnify the plaintiff the amount so demanded,

and all these averments, in my judgment, disclosed a reasonable cause of action against the defendant. In *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors* [1999] 2 CLJ 886, 899, I had occasion to say something in regard to pleadings and this was what I had said:

> The paramount function and duty of the courts would be to see that justice is done in all cases to all parties. As Lord Denning MR once said in *Doyle v. Olby (Ironmongers) Ltd & Ors* [1969] 2 QB 158 at p. 166C:
>
> > We never allow a client to suffer for the mistake of his counsel if we can possibly help it. We will always seek to rectify it as far as we can. We will correct it whenever we are able to do so without injustice to the other side.
>
> And in the context of the present case, there was no mistake at all on the part of the plaintiff's counsel. The pleadings, particularly paras 15 and 16 of the statement of claim, as reproduced earlier, were professionally drafted and, in my judgment, it sufficiently identified the plaintiff's cause of action against the second defendant. It must not be forgotten that every pleading must contain only a statement of the material facts on which the party pleading relies and not the evidence by which they are to be proved (per Farwell LJ in *North-Western Salt Co Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 422). Lord Denman CJ once said in *Williams v. Wilcox & Anor 8 A & E* 331; [1835-42] All ER Rep 25 at p. 27H:

> It is an elementary rule in pleading that, when a state of facts is relied on, it is enough to allege it simply without setting out the subordinate facts which are the means of proving it or the evidence sustaining the allegation.

> To me, only those facts that amount to a cause of action must be alleged. The plaintiff has done just that in the statement of claim. The object of modern pleadings is to prevent surprise and to enable disputes to be litigated in an orderly fashion (*Commodore Pty Ltd v. Perpetual Trustees Estate & Agency Co of New Zealand Ltd* [1984] 1 NZLR 324).

Just like the case of *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors (supra)*, the statement of claim in the present appeal was "professionally drafted" and "it sufficiently identified the plaintiff's cause of action against" the defendant.

Alluding once again to the case of *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors (supra)*, particularly at p. 584 to p. 585 of the MLJ reporting and at p. 914 to p. 915 of the CLJ reporting, this was what I had said:

> Relying on all these authorities, it would be appropriate to say that a case should only be struck out if it is obviously unsustainable. The root word here is not 'unsustainable' but rather 'obviously' which denotes that on the face of it, the claim must be plainly or evidently unsustainable in law. In my judgment, these words cannot be read to mean that the court is to undertake, at this early stage, a detailed scrutiny of the documents and examine the evidence of each party to the dispute. To interpret it as such would be to go against the grain of the provisions of O. 18 r. 19(1) of the RHC. It is apparent that this order was designed specifically to weed out claims that are clearly unfounded and the rationale behind this order has been described lucidly by Tan Sri Chang Min Tat, a former judge of the Federal Court, in *Mallal's Supreme Court Practice* (2nd Ed) Vol 1 at p. 219 as follows:

> This rule enforces the rules of pleading. The court has the power in a summary manner, ie without trial, to stay or dismiss an action or enter judgment accordingly where the pleading discloses no reasonable cause of action or defence, or is scandalous, frivolous or vexatious or it prejudices, embarrasses or delays the fair trial of the action or it is otherwise an abuse of the process of the court. The rule applies as well to an originating summons and a petition, as if the originating summons and a petition were a pleading. But the rule also empowers the court to allow amendments of any pleading in addition to the powers under O. 20.

> Looking at the available affidavit evidence, the plaintiff's case cannot be said to be obviously unsustainable. There were issues – both of fact and law – that require to be tried. This was my judgment and I so hold accordingly.

Yong Pung How CJ Singapore in *Gabriel Peter & Partners (suing as a firm) v. Wee Chong Jin & Ors* [1998] 1 SLR 374 CA said at p. 384 of the report:

> The guiding principle in determining what a 'reasonable cause of action' is under O. 18 r. 19(1)(a) was succinctly pronounced by Lord Pearson in *Drummond-Jackson v. British Medical Association* [1970] 1 All ER 1094. A reasonable cause of action, according to his lordship, connotes a cause of action which has some chance of success when only the allegations in the pleading are considered. As long as the statement of claim discloses some cause of action, or raises some question fit to be decided at the trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out. Where a statement of claim is defective only in not containing particulars to which the defendant is entitled, the application should be made for particulars under O. 18 r. 12 and not for an order to strike out the statement.

Continuing at p. 391 of the report, his Lordship said:

> The only issue which remained for us to consider was whether, from the statement of claim, there was a reasonable cause of action against the respondents. We came to the conclusion that a reasonable cause of action had been disclosed. There were triable issues involved. From a reading of the statement of claim, all the relevant facts giving rise to a claim of libel had been fully pleaded. The alleged defamatory words were particularised and their defamatory effect described. The alleged defamatory words clearly referred to the appellants. The particulars of the publication by the respondents to the various third parties were listed out. A *prima facie* case had been made out. We felt that the case against the respondents was not devoid of merit. A full hearing should be given for the parties to adduce evidence and to present their arguments before the court.

The phrase "letter of credit" has been bandied around in this judgment and it is opportune to refer to what Poh Chu Chai had to say in his book entitled *"Law of Banking"* (2nd edn) in regard to the duty of a bank when negotiating the letter of credit. At p. 958 of that book, the learned author wrote:

> A bank negotiating a letter of credit is under a duty to see that the terms of the letter of credit are strictly complied with by the beneficiary. The documents tendered must appear on their face to comply with the terms of the credit. A bank is not expected to have knowledge of the usage of the

trade or knowledge of legal matters. In *United Bank Ltd. v. Banque Nationale de Paris & Anor* [1991] 3 CLJ 2012., it was decided, *inter alia*, by Chao Hick Tin J that a bank negotiating a letter of credit was under a duty to see that the terms of the letter of credit were strictly complied with by the beneficiary of the credit.

I must now refer to the case of *Midland Bank, Ltd v. Seymour* [1955] 2 Lloyd's List Law Reports 147, where Mr. Justice Devlin in some detail sets out the facts at p. 150 of the report and I need to reproduce them in verbatim in order to understand the factual matrix of the case. There his Lordship said:

> The defendant in this case is a Mr. Seymour who carries on business as a firm, and his activities include – I dare say among other things – importing feathers from Hongkong. He has conducted that business for many years past; he is familiar with the market; and for many years past also his purchases from Hongkong have been financed by the Midland Bank, who are the plaintiffs in the action, through their Aldgate branch with which he deals.
>
> At the end of 1952, Mr. Seymour proposed to enter into a number of contracts for the purchase of feathers with a Chinese concern in Hongkong called the Taiyo Trading Company; and he did in fact enter into a number of contracts, all in December, 1952, and January, 1953. In accordance with his usual practice he arranged to make payment by means of confirmed irrevocable letters of credit which were opened through the plaintiff bank. Although Mr. Seymour had dealt for some time in the Hongkong market and had purchased feathers there, it was the first time he had ever dealt with this concern called Taiyo, and they turned out to be, it is common ground for the purpose of this case, a quite worthless concern who made no attempts to fulfil their contracts. When the first shipment of feathers was inspected by Mr. Seymour at Rotterdam in February, 1953, it was, he said, simply rubbish; and the firm has in effect, as I understand, just disappeared without making any attempt to fulfil its obligations. It has, however, collected substantial sums under these letters of credit in exchange for documents which appeared on the face of them to be in order as contractual documents – whether they complied with the letters of credit is a point that I have to consider – although they represented worthless goods.
>
> When Mr. Seymour discovered that this was the position, he looked to the letters of credit to see whether the bank had acted in strict conformity with its obligations thereunder on its contract with him in making the payments which they did make, and his contention in this case is twofold: first, that the bank did not act in accordance with the letters of credit, and therefore they had no authority to make the payments which they made, and cannot properly debit Mr. Seymour with them; and, secondly, that they were guilty of negligence, in respects which I shall have to consider later on, which,

he says, caused him damage in that they failed to pass on information which would have revealed to Mr. Seymour the untrustworthiness of the Taiyo Trading Company earlier than he found it out, and which would have caused him to take action which might have saved him some of the expense which he has been put to in this case, assuming that he is properly debited under the letters of credit.

The action in form is an action for 8064 pounds 19s. 1d., which was the balance due on the banking account on Apr. 20, 1953; but those, broadly stated, are the issues which it raises, and I shall deal first with the question – so far as I am able to deal with it on the pleadings – whether the bank acted in conformity with the instructions which they had for opening the credit.

Continuing at p. 151 of the report, his Lordship Mr. Justice Devlin said:

Then there is a place for Description, Quantity and Price. That, of course, is left blank, and opposite each of those in the spaces left for them Mr. Sanders filled in: 'Hongkong duck feathers – 85 per cent clean' – that is 'Description.' Opposite 'Quantity' he filled in: '12 bales each weighing about 190 lbs.,' and opposite 'Price,' '5s. per lb.'

As I have said, documents which were apparently in order were tendered and accepted against that letter of credit, and in the set which is appropriate to that letter of credit is the invoice, which sets out the description in full and also the shipping mark 'TTC 1-12 Hamburg.' The next document is the bill of lading, and there under the heading of: 'Particulars furnished by shipper,' there is the same mark as on the invoice, 'TTC 1-12 Hamburg.' Under 'No. of packages' there is '12 bales' and under 'Description of packages and goods,' 'Hongkong duck feathers.' In the space left for 'Gross weight' there is a blank, and also in the space left for 'Measurement' there is a blank.

So that the particulars which are set out on the invoice and in the description in the letter of credit and which are not set out in the bill of lading are '85 per cent clean' and 'each bale weighing about 190 lbs.,' and also, of course, the price which is set out in the invoice and in the letter of credit and not in the bill of lading. I do not think that I need trouble with the other documents except to point out that they are apparently in form the weight list and the certificate of origin. All the documents are consistent with one another in the sense that they make up a set which is apparently referring to the same parcel of goods.

The complaint that is made that the documents do not conform with the letter of credit is this. It is said that if you look at the set as a whole you will find in the set as a whole all the things that the letter of credit requires to be said about the goods – the description, the quantity and the price – but that if you take the bill of lading by itself you will not find all those

things; and I have already pointed out the principal things (and indeed I think all the things) that are missing. The contention of Mr. Seymour is that the bill of lading ought to have contained all these particulars. It is argued that it is not enough that they are to be found in the set as a whole, but that the bill of lading ought to have contained them all, and that as it did not contain them all it is not a bill of lading which ought to have been accepted under the letter of credit, and accordingly Mr. Seymour's mandate to the bank was not complied with.

There is, of course, no doubt that the bank has to comply strictly with the instructions that it is given by its customer. It is not for the bank to reason why. It is not for it to say: 'This, that or the other does not seem to us very much to matter.' It is not for it to say: 'What is on the bill of lading is just as good as what is in the letter of credit and means substantially the same thing.' All that is well established by authority. The bank must conform strictly to the instructions which it receives.

The question in this case, as I see it, is what, upon the true construction of the letter of credit, were the instructions which the bank received that it had to comply with. Upon the true construction of the letter of credit, is the bank required to accept a bill of lading only if it contains all these particulars?

Later at p. 153 of the report, his Lordship continued in serious vein:

For these reasons, therefore, I think that the construction which is advanced by Mr. Diplock is the right construction and the one which I should adopt. The set of documents must contain all the particulars, and, of course, they must be consistent between themselves, otherwise they would not be a good set of shipping documents. But here, you have a set of documents which not only is consistent with itself, but also incorporates to some extent the particulars that are given in the other – the shipping mark on the bill of lading leading to the invoice which bears the same shipping mark and which would be tendered at the same time, which sets out the full description of the goods.

But if I had not reached that conclusion on the ground that Mr. Diplock's construction is the right one, I should have arrived at the same result on another ground. In my judgment, no principle is better established than that when a banker or anyone else is given instructions or a mandate of this sort, they must be given to him with reasonable clearness. The banker is obliged to act upon them precisely. He may act at his peril if he disobeys them or does not conform with them. In those circumstances there is a corresponding duty cast on the giver of instructions to see that he puts them in a clear form. Perhaps it is putting it too high for this purpose to say that it is a duty cast upon him. The true view of the matter, I think, is that when an agent acts upon ambiguous instructions he is not in default if he can show that he adopted what was a reasonable meaning. It is not

> enough to say afterwards that if he had construed the documents properly he would on the whole have arrived at the conclusion that in an ambiguous document the meaning which he did not give to it could be better supported than the meaning which he did give to it. If I am wrong in adopting the construction that Mr. Diplock gives to this document, I am quite clear that at the best it is ambiguous. It is impossible to say that the document specifies in reasonably clear terms that the bill of lading has to contain the description and quantity.

And at the end of the day his Lordship gave judgment to the plaintiff bank.

Next, I shall refer to p. 31 of the book entitled *"Law of Banking"* (2nd edn), where Poh Chu Chai described the bills of exchange in the context of a letter of credit in this way:

> Bills of exchange are used extensively in letters of credit transactions and in credit financing. To take a common example, when an exporter sells goods abroad, he will arrange for the buyer to make payment to him by means of a confirmed irrevocable letter of credit. To carry out his side of the contract, the buyer will arrange for a bank in the seller's country to accept bills of exchange to be drawn by the seller against the tender of documents of title relating to the goods. The seller will be informed by the buyer's bankers of the opening of the letter of credit. Upon receipt of this notification, the seller will draw on the credit by presenting bills of exchange for the bank's acceptance and tendering the relevant documents of title relating to the goods. The bills of exchange drawn by the seller will normally be made payable to the seller or to a third party nominated by the seller. If the bills of exchange are made payable to the seller, the seller may negotiate the bills to a discount house or to a bank. At the maturity of the bills, the discount house or bank will present the bills to the accepting bank for payment. Once the bills are paid, the life cycle of the bills comes to an end.

All these authorities serve as good guidelines to adjudicate encl. 32.

It was at the behest of the defendant that the plaintiff issued the letter of credit bearing number 10053400312 in favour of the first beneficiary – Tae Heung Leather Inc., for the sum of USD150,000 upon the terms and conditions contained in the documentary credit application, the general letter of indemnity and UCP 500. Later at the request of the defendant, the letter of credit was amended favouring the second beneficiary – Sunkyung Limited. The plaintiff made two payments. Firstly, on 11 December 1997 when the plaintiff paid USD75,000. Secondly, on 23 February 1998 when the plaintiff paid USD75,000 to the second beneficiary together with the interest for late payment in the sum of USD1,156.25. By way of conversion to the Ringgit exchange rate from that of USD, the plaintiff made the final payment under the letter of credit in the sum of

RM294,800.84. The plaintiff now sought for the sum of RM283,792.67 after taking into consideration the amount that had been set off and the amount as sought was calculated as at 26 June 1998 together with interest thereon and costs thereto.

Mr. John Yeo Chun Ming, learned counsel for the defendant, argued that the rationale to plead the omitted facts, as alluded to in the early part of this judgment, arose from the contractual relationship between the plaintiff and the defendant which was linked to the letter of credit which was the basis for the plaintiff's claim. He then referred to a book entitled *"Law of Banking, Volume 2: Pledges, Guarantees And Letters Of Credit"*, 3rd edn by Poh Chu Chai where at p. 468 to 469, the learned author said:

> In a letter of credit transaction, four distinct relationships may be identified. These four relationships were categorised by Lord Diplock in *United City Merchants (Investments) Ltd. v. Royal Bank of Canada* [1982] 2 Lloyd's Rep. 1, as follows, at p. 6:
>
> > It is trite law that there are four autonomous though interconnected contractual relationships involved. (1) The underlying contract for sale of goods, to which the only parties are the buyer and the seller; (2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. ... (3) if payment is to be made through a confirming bank the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit; (4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents.

and using this as a leverage he argued that it was incumbent and peculiar to a contract arising out of a letter of credit that payment would only be made upon presentation of the stipulated documents. He reiterated that it was a prerequisite ingredient for the cause of action to accrue once the necessary documents were presented and it was only at that stage that the plaintiff as the issuing bank would be entitled to a reimbursement or to be indemnified by the defendant.

Madam Goh Mey Foon, learned counsel for the plaintiff, was quick on the uptake and she submitted that the author Poh Chu Chai in his book was merely illustrating the four distinct relationships which may exist in a letter of credit transaction. That four distinct contractual relationships, according to her, were between the following parties:

(1) the buyer and the seller;

(2) the buyer and the issuing bank;

(3) the issuing bank and the confirming bank; and

(4) the confirming bank and the seller.

She rightly said that the author Poh Chu Chai in his book did not categorically say that the issuing bank is required to plead "due payment against presentation" and failing which there would not be a cause of action. She emphasised that the passage relied upon by Mr. John Yeo Chun Ming by citing the relevant page of the book written by Poh Chu Chai merely explained, at its best, the possible four contractual relationships but that very passage was not an authority for the proposition that the plaintiff must plead presentation in order to establish a cause of action against the defendant.

Madam Goh Mey Foon with vigour and vitality submitted that the plaintiff's cause of action against the defendant was for breach of contract which breach had been pleaded in para. 12 of the statement of claim. Indeed as I said earlier the ball is now at the feet of the defendant, so to speak. The defendant should have pleaded that there was a condition precedent which had not been fulfilled; the defendant too should have particularised the conditions precedent. Sad to say all these were not done by the defendant.

Not to be outwitted, Mr. John Yeo Chun Ming referred to the case of *May v. Chidley & Another* [1894] 1 QB 451 a decision of Wills J whose decision was concurred by Lawrence J. In a short judgment, Wills J said (see p. 452 and p. 453 of the report):

> I think that this appeal must be dismissed. My only difficulty arises from the reference in the affidavit to the particulars of the claim indorsed on the writ. But on looking at the forms of special indorsement given in Appendix C to the Rules of the Supreme Court, it is apparent that the statement of claim is something which stands by itself, and is distinct from the particulars which follow it; and I think, therefore, that this reference to the particulars does not cut down the effect of the allegations in the first

> paragraph of the affidavit. A defendant in an action on a dishonoured cheque is not indebted unless notice of dishonour has been given. The function of the affidavit is to verify the cause of action, and it does not matter that it does not state or verify all the particulars given in the statement of claim or special indorsement. The statement of claim or special indorsement would, it is true, be defective if the allegation of notice of dishonour were omitted, but the verification of the cause of action in the affidavit may be made in general terms.

and using this judgment as a leverage, it was argued by Mr. John Yeo Chun Ming that the unique obligation to pay upon presentation of the stipulated documents under the contractual relationship between the plaintiff and the defendant arising out of the letter of credit must first exist and pleaded before the plaintiff's right to a reimbursement or to be indemnified arose giving rise to a cause of action. I pause here for a moment and take stock of the situation. As I see it, the defendant relied on the case of *May v. Chidley & Another (supra)* as an authority for the proposition that a statement of claim or special indorsement would be defective if the allegation of notice of dishonour were omitted. In that case, the notice of dishonour was, in fact, pleaded in the indorsement to the writ. But the affidavit verifying the cause of action made under Order XIV contained no allegation that a notice of dishonour had been given. Wills J held that the affidavit verifying the cause of action need not contain an allegation that notice of dishonour had been given to the drawer. I must emphasise that Wills J decided *May v. Chidley & Another (supra)* on the basis of a cheque being dishonoured and not in regard to a letter of credit. Moreover, the requirement to plead notice of dishonour is a statutory requirement under s. 48 of the Bills of Exchange Act 1949 (Act 204) which enacts as follows:

> Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:
>
> Provided that –
>
> (a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;
>
> (b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of subsequent dishonour by non-payment unless the bill shall, in the meantime, have been accepted.

but in the context of a letter of credit, there is no similar statutory requirement at all.

Order 18 r. 7(4) Of The RHC – Conditions Precedent

It is now timely to refer to this Order. It is worded as follows:

> A statement that a thing has been done or that an event has occurred, being a thing or event the doing or occurrence of which, as the case may be, constitutes a condition precedent necessary for the case of a party is to be implied in his pleading.

The Supreme Court Practice 1982, vol. 1, Part 1 at p. 302 to p. 303 gives a good write up of O. 18 r. 7(4) of the RHC and for convenience the passages found therein is now reproduced verbatim:

> Cases constantly occur in which, although everything has happened which would at common law *prima facie* entitle a man to a certain sum of money, or vest in him a certain right of action, there is yet something more which must be done, or something more which must happen, in the particular case, before he is entitled to sue, either by reason of the provisions of some statute, or because the parties have expressly so agreed; this something more is called a condition precedent. It is not of the essence of such a cause of action, but it has been made essential. It is an additional formality superimposed on the common law.
>
> A general averment of the due performance of all conditions precedent is implied in every pleading and therefore it need not be alleged (para. (4), *supra*; *Gates v. W.A. & R. J. Jacobs* [1920] 1 Ch. 567). It is for the defendant, if he contends that there was a condition precedent and that it has not been duly performed, to state specifically what that condition was, and to plead its non-performance; otherwise its due performance will be presumed. And it is not sufficient for him to allege generally that 'an express condition' had been agreed to; he must state its terms, and between whom it was made, and whether verbally or in writing (*Abbs v. Matheson & Co.*, 104 LTJ 268; and see *Whiting v. E. London Waterworks* [1884] WN, p. 10). Nevertheless, when a condition precedent is properly pleaded, the burden of proving its due performance or the waiver of its due performance still rests on the plaintiff.

and flowing from it, I shall now endeavour to examine the case of *Gates v. W.A. And R.J. Jacobs, Limited* [1920] 1 Ch 567. That was a case where the landlord filed an action to recover possession of the demised premises known as numbers 53 and 55, Great Eastern Street, Shoreditch by reason of breaches of covenant alleged to have been committed by the lessees. Under s. 14 of the Conveyancing Act 1881, a notice has to be served on the lessee specifying the particular breaches of covenant complained of, and unless and until such a notice is served and the lessee fails within a reasonable time to remedy the breaches and to make reasonable

compensation, the lessor cannot enforce his right of re-entry. Thus, under s. 14 of the Conveyancing Act 1881 there was a condition precedent to be performed before an action for recovery of possession will lie.

In the statement of claim of that case, the landlord gave particulars of diverse material breaches of covenant, but did not allege that the statutory notice of breaches required by s. 14 of the Conveyancing Act 1881 had been served on the defendants and had not been complied with. An argument was advanced for the landlord to the effect that under r. 14 of Order XIX, an averment of the performance of that condition was implied in the landlord's statement of claim and need not be specifically alleged or pleaded. On the other hand, it was argued on behalf of the lessee that the non-averment in the statement of claim of the performance of the condition precedent rendered the plaintiff demurrable and reliance was placed on the speech of Lord Buckmaster in *Fox v. Jolly* [1916] 1 AC 1, 8 where after quoting s. 14 of the Conveyancing Act 1881, he said:

> If such condition were not satisfied and entry were attempted at common law, such entry would be a trespass; if proceedings were instituted to obtain possession they would be instantly demurrable.

But P.O. Lawrence J who decided *Gates v. W.A. And R.J. Jacobs, Limited (supra)* distinguished the case of *Fox v. Jolly (supra)* in this way (see p. 570 of the report):

> I do not think that Lord Buckmaster had r. 14 of Order xix. in his mind; what he meant in making that statement was that if no such notice had been given the action would not be maintainable. That is a different thing from saying that the notice must be specifically pleaded.

Finally, P.O. Lawrence J concluded at p. 570 of the report by saying:

> In my judgment the concluding words of r. 14 of Order xix. mean that an averment that the notice was given, although not specifically pleaded, must be implied. In other words the statement of claim must be read as if it contained an allegation that the plaintiffs had given the necessary notice under s. 14 of the Act before the commencement of the action. It is said that the absence of the plea is embarrassing, but I fail to see how that can be so because the defendants can obtain particulars of the notice by discovery in the action. I cannot therefore say that the plaintiffs' pleading discloses no reasonable cause of action or that it is frivolous or vexatious or even embarrassing. The motion will be dismissed with costs.

Another interesting case to consider would be that of *Equitable Trust Company of New York v. Dawson Partners, Ltd* [1927] Lloyd's List Law Reports, vol. 2 p. 49. In that case the court (House of Lords) had to consider the crucial question of whether the presentation of a single certificate of quality issued by only one expert who was a sworn broker satisfied the requirement under the letter of credit which was that the "certificate of quality issued by experts who are sworn brokers." In deciding that crucial issue, the House of Lords reckoned that the compliance of the requirement of the letter of credit was a condition precedent to the right of the bank to claim indemnity. Viscount Sumner writing a separate judgment had this to say at p. 52 of the report:

> … The case rests entirely on performance of the conditions precedent to the right of indemnity, which is provided for in the letter of credit.
>
> It is both common ground and common sense that in such a transaction the accepting bank can only claim indemnity if the conditions on which it is authorised to accept are in the matter of the accompanying document strictly observed. There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe: if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk. The documents tendered were not exactly documents which the defendants had promised to take up, and *prima facie* they were right in refusing to take them.

Continuing on the same page and spilling over to p. 53, Viscount Sumner said aptly:

> The plaintiffs sought to bring the certificate tendered within the documents stipulated for by saying that on a business construction of a business document the certificate of one expert really is or may be what is meant by the 'certificate of experts.' This last expression, it is accordingly suggested, means in a business sense the certificate either of one or of more than one. In plain English, of course, it does not. A certificate of experts may, I suppose, be that of any number from two to infinity, but it cannot be satisfied by the certificate of one expert only.

But the case of *Equitable Trust Company of New York v. Dawson Partners, Ltd (supra)* are factually different from the present case. There there was a requirement for a "certificate of experts" and here there was none. I certainly prefer the decision of P.O. Lawrence J in *Gates v. W.A. And R.J. Jacobs, Limited (supra)* and that being the case, the issues of whether:

(a) the claim for payment was submitted to the plaintiff within the validity period of the letter of credit;

(b) the documents listed in the letter of credit had been tendered to the plaintiff prior to the payment by the plaintiff; and

(c) there was any discrepancy on the documents tendered or whether the discrepancy, if any, had been waived by the defendant,

were all conditions precedent for the release of payment under the letter of credit and they were all implied in the statement of claim within the meaning and in the context of O. 18 r. 7(4) of the RHC. I will, in due course, revert to the case of *Equitable Trust Co. of New York v. Dawson Partners, Ltd (supra)* in the later part of this judgment.

It must be emphasised that the plaintiff had by way of paras 8 and 9 of the statement of claim pleaded the fact that payments had been made under the letter of credit. The fulfilment of the conditions precedent prior to the release of those payments must therefore be implied in the statement of claim within the ambit of O. 18 r. 7(4) of the RHC and, consequently, there was no necessity to plead the same. Furthermore, para. 4 of the statement of claim categorically pleaded that the payment under the letter of credit was subject to the receipt by the plaintiff of the documents listed in the letter of credit.

Reverting back to the case of *Gates v. W.A. And R.J. Jacobs, Limited (supra)*, it must be recalled that P.O. Lawrence J said that the occurrence or fulfilment of a condition precedent was implied and it need not be specifically pleaded. In my judgment, it would entirely be on the defendant's part to plead that there was indeed a condition precedent which had not been fulfilled and, at the same time, the defendant must provide the particulars thereto. Since the defendant contended that a condition precedent had not been fulfilled, it was for the defendant to raise the contention by pleading the non-performance of the conditions precedent. The obligation on the part of the defendant to specifically plead non-performance of a condition precedent comes squarely within the ambit of O. 18 r. 8(1) of the RHC which states as follows:

> A party must in any pleading subsequent to a statement of claim plead specifically any matter, for example, performance, release, any relevant statute of limitation, fraud or any fact showing illegality –
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable; or

(b) which, if not specifically pleaded, might take the opposite party by surprise; or

(c) which raises issues of fact not arising out of the preceding pleading.

That being the case, it was entirely up to the defendant to allege in the statement of defence that the plaintiff had, in fact, in breach of the terms of the letter of credit or in breach of the terms of UCP 500, released the payment of those sums of money as alluded to in paras 8 and 9 of the statement of claim despite the expiry of the validity period of the letter of credit. The defendant too did not aver in the statement of defence that payment was made by the plaintiff:

(a) without complying with the terms of the letter of credit;

(b) without receiving the clean airway bills made out to the order of the plaintiff as required under the letter of credit,

and to add insult to injury the defendant did not give full particulars of their bald allegations. But to be fair to the defendant, there were averments in para 8 of the statement of defence in regard to:

(1) the issue of the breach of the plaintiff's duty in examining correctly the documents tendered under the letter of credit;

(2) and to the question of whether the documents were presented within the validity period of the letter of credit;

(3) and also in regard to the effect of the cancellation of the letter of credit by the plaintiff,

and the plaintiff had answered the above listed issues in its reply and defence to counterclaim as reflected in encl. 13 that was filed on 3 November 1998.

Was There An Element Of Surprise?

In my judgment, there was no element of surprise whatsoever. The defendant knew what was in store for them when they received the statement of claim. Indeed, all the material facts had been pleaded and the defendant was well aware and had knowledge of the basis of the plaintiff's claim. It seemed to me that the defendant had no difficulty in preparing its statement of defence and counterclaim. The defendant too was adept at filing affidavits in response to the plaintiff's application for summary judgment. The defendant too was able to formulate its defence by incorporating the issue of non-performance of conditions precedent in its

statement of defence as well as in its affidavits. The defendant was very confident and did not see the need to ask the plaintiff for further and better particulars.

Mr. John Yeo Chun Ming with finesse differentiated between:

(1) a condition precedent which does not form the basis of the particular cause of action; and

(2) a condition precedent which forms an integral ingredient of the cause of action.

but it was, with respect, an exercise in futility because there was no supporting legal basis for such differentiation at all. Be that as it may, it is opportune to state that a condition precedent exists either by reason of the provisions of the law or because the parties have contractually agreed to it. In the present appeal, the existence of the condition precedent was by virtue of the contractual terms as contained in the letter of credit. It must be recalled that the case of *Equitable Trust Company of New York v. Dawson Partners, Ltd (supra)* is an authority for the proposition that the compliance of the requirement of the letter of credit is a condition precedent to the right of the bank to claim an indemnity.

It was submitted by the defendant that making payment did not indicate any compliance in respect of the payment under the strict terms as set out in the letter of credit. The short reply to this would be: the compliance can readily be implied and it was for the defendant to allege non-compliance before the plaintiff was required to prove compliance.

To sum up, there was no surprise at all on the part of the defendant.

In my judgment, all the material facts have been pleaded and some of the omitted facts were conditions precedent that could be implied and need not be pleaded while the balance thereof should be considered as evidence where the plaintiff would be precluded from pleading. There was no necessity for the defendant to assume certain facts which were not within their knowledge since the best course of action for the defendant to adopt would be to obtain further and better particulars from the plaintiff.

The law has been crystallised for the benefit of everyone in regard to an instruction that is given under a letter of credit. It is this. That when instructions given under a letter of credit are clear and unambiguous, they must be strictly complied with by the beneficiary of the credit. The case of *Equitable Trust Company of New York v. Dawson Partners, Ltd (supra)* as alluded to earlier would be a classic example to rely upon. There the

House of Lords decided that a stipulation in a letter of credit requiring a certificate of quality to be issued by experts who were sworn brokers meant clearly that the certificate had to contain the signatures of at least two brokers. Briefly, the defendants in that case were importers who had contracted to buy vanilla beans from a firm in Batavia. Payment for the goods was supposed to be made by means of a confirmed irrevocable letter of credit. The plaintiffs were requested to issue the letter of credit. The buyers then asked for a certificate of quality to be issued by experts who were sworn brokers and the certificate was supposed to be signed by the Chamber of Commerce. The correspondent bank was quite bold and accepted a certificate signed by a single broker and certified by the Chamber of Commerce. The goods on arrival were found to consist mainly of sticks, stones and some old iron. The buyers rejected the goods. The plaintiff bank argued, *inter alia*, that the term employed like "sworn brokers" was ambiguous because it could connote a singular as well as the plural. The House of Lords decided that the words were clear and they meant two or more brokers. Likewise in the present case, under the general letter of indemnity the defendant agreed and undertook to indemnify the plaintiff against certain eventualities as listed in para 6 of the statement of claim as reproduced earlier and the defendant cannot now wriggle their way out of it. Even under the documentary credit application as alluded to in para 6 of the statement of claim, the defendant had clearly empowered the plaintiff to pay and to charge to the defendant's accounts for all moneys paid by the plaintiff under the letter of credit. It would be too late in the day for the defendant to say that there was no cause of action in the plaintiff's statement of claim. I cannot help but feel that the defendant was purposely prolonging the matter by filing encl. 11. In *Siang Yam Beng v. Marushin Canneries (M) Sdn Bhd & Anor* [1995] 4 MLJ 691, 700, I had this to say:

> The courts are always wary and will tread cautiously before summarily striking out the statement of claim and barring the plaintiff access to trial by calling witnesses. Lord Diplock in *Tractors Malaysia Bhd v. Tio Chee Hing (supra)* described that power as drastic and I may add it is also draconian in nature. Seah FJ (as he then was) in *CC Ng & Brothers Sdn Bhd v. Government of State of Pahang* [1985] 1 CLJ 235 at p. 239 referred to *Lawrance v. Lord Norreys* [1890] 15 App Cas 210, 219 and quoted the words of Lord Herschell in that case to the following effect:
>
> > It cannot be doubted that the Court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the Court. It is a jurisdiction which ought to be very sparingly exercised and only in very exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved.

and I will certainly be cautious in dealing with encl. 32. The plaintiff's day in court should not be deprived by an application in the nature of encl. 11 which was devoid of merit.

Pleading Material Facts

According to Farwell LJ in *N.W. Salt Co. Ltd v. Electrolytic Alkali Co Ltd* [1913] 3 KB 425:

> Every pleading must contain only a statement of the material facts on which the party pleading relies, and not the evidence by which they are to be proved.

Cotton LJ in *Philipps v. Philipps* [1878] 4 QBD 133, 139 aptly said:

> In my opinion it is absolutely essential that the pleading, not to be embarrassing to the defendants, should state those facts which will put the defendants on their guard, and tell them what they have to meet when the case comes on for trial.

Order 18 r. 7(1) of the RHC states as follows:

> Subject to the provisions of this rule and rules 10, 11 and 12, every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and the statement must be as brief as the nature of the case admits.

and it emphasises the need to prepare in summary form the material facts but not the evidence and the statement in the pleading must be as brief as possible according to the nature of the case. According to Brett J in *Lord Hammer v. Flight* [1876] 24 WR at p. 347:

> Pleadings now are to be merely concise statements of facts which the party pleading deems material to his case.

Now, applying the law to the present appeal would simply mean that the plaintiff must plead material facts in a summary form. And that the material facts must be as brief as the nature of the case allows. The plaintiff would certainly not be allowed to plead evidence. In my judgment, the plaintiff had pleaded the material facts in the course of formulating its cause of action. The plaintiff had pleaded the salient terms of the letter of credit, the documentary credit application, the general letter of indemnity and UCP 500. At para. 12 of the statement of claim, the plaintiff pleaded the breach by the defendant which breach formed part and parcel of the cause of action. It was argued that the plaintiff should plead in the

statement of claim the details of the documents tendered, the time and date of the presentation and a host of other things as enumerated in this judgment – such requirements would entail pleading evidence and other non-material facts which would certainly run counter to O. 18 r. 7(1) of the RHC. I have alluded to the object of modern pleadings in *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors (supra)* at p. 571 of the MLJ reporting and at p. 899 of the CLJ reporting which had been reproduced somewhere in this judgment and I do not propose to add anything useful to it. Suffice for me to say that there was no element of surprise at all because all the material facts have been pleaded and the defendant knew and was well aware of the basis of the plaintiff's claim. Until today, the defendant had not requested from the plaintiff any further and better particulars. The defendant too had not filed any application for further and better particulars. An important pre-trial process would be by way of a discovery as set out in O. 24 of the RHC. It is a process whereby the parties would immensely gain from it if it is adopted with the greatest circumspection. Discovery would be two fold. One entails discovery of document which relates to matters in dispute and that document is in the possession of the opposite party. The other would relate to discovery by way of an interrogatory of the facts that is relevant to the issue at hand and within the knowledge of the party that is being interrogated. Under O. 24 r. 1 of the RHC, in an action begun by writ, discovery of documents would be automatic and it is normally done within 14 days after the pleadings are deemed to be closed. To me, discovery under O. 24 of the RHC would extend to all materials that come under the purview of s. 3 of the Evidence Act 1950. The case of *Gant v. South Western & Country Properties* [1975] Ch. 185 would be a case in point. The court will not be deterred in ordering discovery even if it involved voluminous documents (*Faber Merlin Malaysia Bhd v. Ban Guan Sdn Bhd* [1981] 1 MLJ 105). Be that as it may, it would be germane to refer to the case of *Hall v. Eve* [1876] 4 Ch. D 341. That was a case where the plaintiff claimed specific performance of an agreement between the defendants W. Eve and G. Whiffin of the one part, and the defendant Thomas Lane of the other part, whereby Eve and Whiffin agreed to grant a lease of certain building land to Lane for 90 years with an option to Lane of purchasing the freehold at a price therein mentioned before 25 December 1875. Lane covenanted with the lessors to build within 12 months certain houses on the premises. The plaintiff in his statement of claim alleged that Lane had transferred his interest to the plaintiff, who gave notice of his intention to exercise his option of purchase but Eve and Whiffin refused to execute a conveyance to him. The defendants Eve and Whiffin in their statement of defence alleged that before the transfer of the agreement to the plaintiff, the

defendant Lane had committed certain breaches of his contract which gave the defendants Eve and Whiffin a right to put an end to the agreement – which they had accordingly done and had commenced an action to recover the land from the plaintiff. In his reply, the plaintiff admitted some of the paragraphs in the statement of defence, and denied others, and he also pleaded that if (which he did not admit but denied) there had been any default or breach of the agreement on the part of Lane, the defendants Eve and Whiffin had waived it; and in regard to the provision which was alleged to have been broken, he pleaded that if it had been broken by Lane, the defendants were not entitled by reason of such breach to determine the agreement, for reasons which he stated. The plaintiff also alleged concealment, false representation and want of equity; and, lastly, the plaintiff joined issue with the defendants upon their statement of defence, except as to such of the allegations and statements as were thereinbefore admitted. The plaintiff also served the defendants with notice of trial. The defendants Eve and Whiffin then moved the court before Vice Chancellor Bacon that the reply delivered by the plaintiff might be set aside as being irregular and erroneous in form and pleading and that the notice of trial delivered at the same time might also be set aside as being irregular. The motion came up for hearing before Vice Chancellor Bacon on 30 November 1876.

Vice Chancellor Bacon gave judgment to the defendants Eve and Whiffin and his Lordship said at p. 313 of the report (a very short judgment):

> My notion of the Act of Parliament is that it was the intention of the Legislature to simplify proceedings as far as procedure goes, and to insist that parties to an action should have their issues pointed and distinct.
>
> Here the plaintiff has denied the truth of statements in the defence, and then pleaded that even if the defences be true, he is entitled to relief on various equitable grounds. All that ought to have appeared in his statement of claim. Such a mode of pleading, in my opinion, introduces all the evils which once prevailed in the Courts of Common Law.
>
> I have no doubt that the pleading is erroneous. If any doubt be felt on the subject, it must be removed by some tribunal more authoritative than this.
>
> The reply must be set aside, as well as the notice of trial. There will be leave given to the plaintiff to amend his statement of claim; and the costs will be reserved generally on both sides till the hearing of the trial.

The plaintiff appealed and the appeal came up for hearing on 20 December 1876. The Court of Appeal (James LJ, Baggallay JA, and Bramwell JA) allowed the appeal. James LJ observed at p. 345 of the report:

> Of course if the rules had so provided expressly, the Court would be bound by them; but as the rules have not so provided, it seems to me most illogical that the plaintiff should have to do this. The rule says that the plaintiff must make a statement of complaint, and the relief or remedy to which he claims to be entitled. It is no part of the statement of claim to anticipate the defence, and to state what the Plaintiff would have to say in answer to it.

Bramwell J.A. writing a separate judgment said at p. 347 to p. 348 of the report:

> The 2nd rule of Order xix. says that the Plaintiff shall deliver to the Defendant a statement of his complaint and of the relief to which he claims to be entitled. In the present case the fact that the Defendant had waived the alleged forfeiture was no part of the Plaintiff's complaint or of the relief which he claimed. His complaint is that the Defendant had broken the agreement, and the relief he prays is specific performance; and it seems to me that it would be out of place and illogical if this new matter of the replication were put into the statement of claim, and certainly the 2nd rule does not require that it should be. I cannot help thinking it would be a mischievous thing to anticipate a defence that may never be made. If the Plaintiff were to do this, he might also anticipate every form of defence, and that would lead to great length of pleading. It appears to me that an allegation that the Defendants had waived their right is much more cheaply, conveniently, and compendiously made in the reply than by amendment in the Statement of claim.

Now, in the present appeal, the claim by the plaintiff against the defendant was for breach of contract or for breach of an indemnity, namely, the defendant's failure to reimburse the plaintiff the amount paid under the letter of credit and to indemnify the plaintiff for the loss incurred consequent upon the issuance of the letter of credit and not on presentation of the documents for payment or non-compliance of the conditions precedent. It was clear as crystal that the issues of presentation and the non-compliance of the conditions precedent were not part and parcel of the plaintiff's complaint. The plaintiff's complaint was that the defendant had breached the terms of the documentary credit application, the general letter of indemnity and UCP 500. Just like the Court of Appeal judges in *Hall v. Eve (supra)*, it was part and parcel of my judgment that the plaintiff in the present case was not bound "to anticipate a defence that may never be made" (per Bramwell J.A.).

In *Lim Seak Huat v. Malayan United Realty Sdn Bhd (supra)*, the court there said at p. 345 of the report in regard to striking out in these words:

I pause here to take stock of the situation. In the recent case of *Pengiran Othman Shah bin Pengiran Mohd. Yusoff & Anor v. Karambunai Resorts Sdn Bhd (formerly known as Lipkland (Sabah) Sdn Bhd) & Ors* [1996] 1 MLJ 309, the Court of Appeal had occasion to say something about Order 18 r. 19 of the RHC. Siti Norma Yaakob JCA delivering the judgment of the Court of Appeal had this to say at p. 320 of the report:

> The discretionary power to dismiss an action summarily under O. 18 r. 19 and under the inherent jurisdiction of the court is a drastic power which should only be exercised in plain and obvious cases, as the effect of the exercise of such a power is to shut out the plaintiff altogether from pursuing his claim. (See *Tractors (M) Bhd v. Tio Chee Hing* [1975] 2 MLJ 1).

In *Ng Kian Chong & Ors v. Saw Seng Kee* [1994] 4 CLJ 857, the court there said at p. 862:

> I must at once say that the burden upon an applicant who asks that a writ of summons and the statement of claim be struck out is a heavy one. It is indeed onerous. He must be able to show that the action must fail or that for some other reason it is an abuse of the process of the court or is frivolous or vexatious.

In *Pet Far Eastern (M) Sdn Bhd v. Tay Young Huat & Ors (supra)*, the court there at p. 582 of the MLJ reporting and at p. 911 of the CLJ reporting remarked that:

> The English Court of Appeal in *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Clark Ltd* [1899] 1 QB 86 laid down a time honoured principle that only in plain and obvious cases that recourse should be had to the summary process.

In *Hirsch & Another v. Somervell & Others* [1946] 2 All ER 430, 433, Asquith LJ aptly said:

> On an application to strike out a statement of claim the question for the court is not whether the action is more likely to fail than succeed, but whether the claim is so incontestably bad that the action should not be allowed to come to trial at all. The judge who made the order appealed from proceeded on this basis, and so do we.

I have endeavoured to show that this was not a plain and obvious case for striking out. The plaintiff had professional advice when the statement of claim was drafted and filed; and his day in court should not be denied at this point of time. It would certainly be perverse and not in accord with the administration of justice to deprive the plaintiff of an opportunity to proceed to trial. For the reasons adumbrated above, I dismissed the defendant's appeal in encl. 32 with costs.

Addendum

Factually speaking, the present appeal was entirely different from the case of *J.H. Rayner And Company, Limited v. Hambro's Bank, Limited* [1943] 1 KB 37. In that case, the bank received instructions from a customer to open a confirmed credit in favour of the plaintiffs covering a cargo of "coromandel groundnuts". The bank opened the credit and notified the plaintiffs that it was available against invoice and bills of lading for "coromandel groundnuts". The plaintiffs presented the bills of lading for "machine-shelled groundnut kernels" accompanied by an invoice for "coromandel groundnuts". The bank acted cautiously and refused payment, and the plaintiffs sued the bank for breach of the undertaking in the letter of credit. Evidence was accepted by Atkinson J that "machine-shelled groundnut kernels" were, and were in fact universally understood in the trade to be identical with "coromandel groundnuts". Atkinson J gave judgment for the plaintiffs and the bank being aggrieved, appealed. On appeal, Mackinnon LJ reversed the decision of Atkinson J and he held that where the customer of a bank instructed the bank to open a credit, the bank acted at its own peril if it departed from the precise terms of the mandate, and that, consequently, the action must fail. Mackinnon LJ too was of the opinion that the bank was under no duty to know the trade customs and trade terms of its customers. In the present appeal, the existence of the general letter of indemnity put it far apart from the facts in *J.H. Rayner And Company, Limited v. Hambro's Bank, Limited (supra)*. That general letter of indemnity was binding on the defendant and it certainly was the damning feature against the defendant in the present appeal.

Bailhache J in *English, Scottish and Australian Bank Ltd v. Bank of South Africa* [1922] Lloyd's Rep 21, was of the view that the bank was not bound or entitled to honour drafts presented to it under a letter of credit unless those drafts with the company documents were in strict accord with the credit as opened. In the present appeal, the plaintiff issued the letter of credit in favour of both the beneficiaries – Tae Heung Leather Inc., and Sunkyung Limited, upon the terms and conditions as set out in the documentary credit application, the general letter of indemnity and UCP 500; and it can be surmised that the plaintiff in the present appeal had complied with the terms of the contract. In my judgment, the plaintiff's claim in the present appeal was not "incontestably bad" nor was it a "plain and obvious case" as to warrant the striking out as proposed by the defendant. It was also part and parcel of my judgment that the plaintiff should not be shut out completely from pursuing its claim in a court of law.

The *de minimis* rule as propounded in *Moralice (London) Ltd v. ED & F Man* [1954] 2 Lloyd's Rep 526 cannot be applied to the present appeal. In that case only 499.7 metric tons of sugar were supplied as against the requirement of 500 metric tons and the court there held that the *de minimis* rule did not apply in a letter of credit transaction.

The case of *Beyene & Hanson v. Irving Trust Co.* 762 Fed Rep, 2d series 4 involved the misspelling of the name of the person to whom notice was to be given on the arrival of the goods. The name of "Mohammed Soran" was written instead of "Mohammed Sofan" and the court held that the misspelling was indeed a material discrepancy. There was, in the present appeal, no question of misspelling at all. It was, pure and simple, a claim for the final payment under the letter of credit in the sum of RM283,792.67 together with interest calculated on a daily basis at the rate of 5% above the plaintiff's base lending rate commencing on 26 June 1998 to the date of full payment. Whether the plaintiff should succeed would only be known at the trial proper. In the meantime, the plaintiff should have his day in court where the full rigours of the trial must be brought to bear upon not only the plaintiff but also the defendant. This was my judgment and I so hold accordingly.